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Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

ROBERT L. PRYOR, Chapter 7 Trustee of the Bankruptcy Estate of Christos Vouzianas and Nota Vouzianas,

Petitioner,

v.

READY & PONTISAKOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 327(a) of Title 11 of the United States Code (the "Bankruptcy Code") provides only for a trustee to retain counsel, subject to the bankruptcy court's approval. Nevertheless, the Second Circuit in this case held that the bankruptcy court was justified, in a personal injury action, which the debtor commenced prior to the filing of a bankruptcy petition, to replace the trustee's choice of counsel with counsel the debtor retained prior to the bankruptcy filing.

The question presented is whether a bankruptcy court is authorized under the Bankruptcy Code to select counsel for the trustee.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The bankruptcy court's opinion (per Eisenberg, B.C.J.) granting the motion of the law firm of Ready & Pontisakos, LLP, to vacate the court's approval of Marcus & Katz as counsel for the trustee and to allow the respondent to represent the trustee in his pre-bankruptcy filing personal injury lawsuit dated December 3, 1999, was unpublished (Appendix ("App.") 29a-47a). The district court's subsequent opinion reaffirming that holding is published at 250 B.R. 478. (App. 20a-28a). The court of appeals opinion (per. Pooler, J. joined by Straub, J. [Sack, J. dissenting]) is published at 259 F.3d 103. (App. 1a-19a).

STATEMENT OF JURISDICTION

The court of appeals entered its decision and judgment on August 1, 2001, and denied rehearing *en banc* on October 5, 2001. (App. 51a-52a). Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 327(a):

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons that do not hold or represent an interest adverse to the estate, and that are disinterested persons to

represent or assist the trustee in carrying out the trustee's duties under this title.

Federal Rules of Bankruptcy Procedure Rule 2014(a):

> An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103 or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a Chapter 9 municipality case, a copy of the application shall be transmitted to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

STATEMENT OF THE CASE

The present case, for which a writ of certiorari is requested, concerns the power of a bankruptcy trustee to appoint special counsel. The panel decision, written by the Honorable Rosemarie S. Pooler, United States Circuit Judge and joined in by the Honorable Chester J. Straub, United States Circuit Judge, concluded that the bankruptcy court was justified in displacing the trustee's special counsel with the pre-petition personal injury attorneys retained by the debtor. The Honorable Robert D. Sack, United States Circuit Judge, in a dissenting opinion rejected the foregoing holding on the dual grounds that: (i) Section 327 of Title II of the United States Code ("Bankruptcy Code"), authorizes only the trustee to retain counsel, subject to the limited power of the bankruptcy court to reject the trustee's choice pursuant to Bankruptcy Code Section 327(a) and the case law interpreting same; and (ii) even under the Bankruptcy Act of 1898, pursuant to the standard announced by the Second Circuit in *In re Mandell*, 69 F.2d 830 (2d Cir. 1984), a bankruptcy court was authorized in only the rarest of instances to replace a trustee's choice of counsel with one of its own choosing.

The material operative facts are undisputed. The debtor, Christos Vouzianas and his wife, Nota Vouzianas filed for Chapter 7 relief under the Bankruptcy Code on April 2, 1999 transferring, as a consequence, their non-exempt assets to the bankruptcy estate, in exchange for their right to discharge their pre-petition debts. Robert L. Pryor was appointed the permanent trustee over the Vouzianas bankruptcy estate in May of 1999. The only asset of the estate consisted of Christos Vouzianas' personal injury lawsuit arising from a work related injury which occurred in August, 1994. As a

consequence of the bankruptcy filing the Vouzianas interest in the personal injury lawsuit consisted of a $7,500 exemption. Vouzianas' creditors, represented by the Trustee, were entitled to all monies recovered on behalf of the estate in excess of the modest exemption belonging to the debtor.

Following the Trustee's appointment he applied to the Bankruptcy Court and obtained an order retaining Marcus & Katz as his counsel for purposes of prosecuting the Vouzianas personal injury lawsuit. The Bankruptcy Court approved the retention of Marcus & Katz pursuant to Bankruptcy Code § 327(a). Marcus & Katz were, undisputably, qualified and no finding to the contrary was ever made.

The debtor's counsel, Ready, did not recognize the retention of Marcus & Katz. After refusing for several months to turn over its file, Ready brought an Order to Show Cause before the bankruptcy court seeking appointment as the trustee's attorney in the personal injury lawsuit. Ready cited its monetary investment in the case, familiarity with the file and the debtor's confidence with Ready as its reasons for the relief requested. The Trustee's choice did not figure into this equation. The Trustee opposed the motion on the grounds that he was entitled to appoint his own counsel, with whom he reposed his confidence and that Marcus and Katz were otherwise qualified pursuant to Bankruptcy Code § 327.

The bankruptcy court on December 3, 1999 granted Ready's motion. In granting the motion, the bankruptcy court found without an evidentiary hearing that Ready was capable, had been involved in the case for four to five years, had performed reasonably and constituted the debtor's preferred choice. The district court affirmed on the grounds that

Section 327(a) does not apply to a pre-bankruptcy personal injury lawsuit. The court of appeals decision affirmed the district court on the grounds that under the circumstances of the case the bankruptcy court acted within its discretion in appointing the debtor's pre-petition personal injury counsel, finding that appointment to be in the best interest of the bankruptcy estate.

The majority decision concluded, based upon pre-bankruptcy code law, that the bankruptcy courts possess discretion, in appropriate cases, to reject the trustee's choice of counsel and, instead, choose counsel for the trustee. *In re Mandell, supra*. The Second Circuit concluded that the case was unique, justifying the bankruptcy court's decision to require the trustee to use the debtor's pre-petition personal injury attorneys. In so ruling, the Second Circuit found that Section 327 of the Bankruptcy Code operates as a judicial check on the trustee's power to appoint counsel, and inherent in that check is the authority to select counsel for the trustee, when that it is in the best interests of the bankruptcy estate.

The dissent criticized the majority decision on the grounds that the Bankruptcy Code does not provide for court appointed counsel. The dissent stated, ". . . I do not understand, and none of the four other judges to have considered this case has satisfactorily explained from where flows the authority of the bankruptcy court to appoint an attorney for the trustee against the trustee's will."

Following receipt of the foregoing decision petitioner sought re-hearing *en banc* due to an apparent conflict between the court of appeals decision in this case and its prior decision in *In re Mandell, supra*, and due to the great importance of the Vouzianas decision to the administration of bankruptcy cases, generally. The petition for a re-hearing *en banc* was

denied and this petition for a writ of certiorari was brought, within ninety (90) days of the order denying the petition for *en banc* consideration.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two related reasons. *First*, the Second Circuit decision constitutes a judicially crafted rule for which there is no legal authority raising a question that has not been, but should be, decided by this Court. Section 327(a) of the Bankruptcy Code authorizes only the trustee to retain counsel, subject to bankruptcy court approval. The Second Circuit decision, on the other hand, permits the bankruptcy court to substitute its judgment for that of the trustee, when it finds it in the best interests of the bankruptcy estate.

Second, the Second Circuit's decision contravenes the intent of Congress when it enacted the Bankruptcy Reform Act of 1978. An express purpose of the Act was to delegate the administration of the bankruptcy case to the trustee. By permitting the bankruptcy court to not only veto a trustee's choice of counsel, but also to impose counsel on the trustee when it concludes it will benefit the estate, the Second Circuit radically departed from the statutory scheme envisioned by Congress when it enacted the Bankruptcy Code.

A. The court below has decided an important issue of federal law, concerning a bankruptcy court's authority to appoint counsel on behalf of a bankruptcy estate which has not been, but should be, decided by this Court.

A writ of certiorari should issue because of the extraordinary importance of the Second Circuit's decision to the administration of bankruptcy cases, generally. The Second Circuit, relying upon *In re Mandell, supra* found inherent authority for a bankruptcy court to select counsel for the trustee when it concludes that it is in the best interest of the estate. This Court has never ruled on whether a bankruptcy court's oversight powers are so broad as to actually permit a bankruptcy court to select a trustee's counsel.

(i) The Vouzianas Holding is Contravened by Bankruptcy Code § 327(a) and Bankruptcy Rule 2014(a).

Section 327 authorizes the trustee, alone, to appoint counsel, subject to bankruptcy court approval. For this reason the dissent found that the bankruptcy court's ruling was unauthorized, stating as follows:

> Section 327(a) of the Bankruptcy Code, 11 U.S.C. §327(a), permits "the trustee, with the court's approval," to appoint its own counsel. And the bankruptcy rules provide: "An order approving the employment of attorneys . . . pursuant to §327 . . . shall be made *only* on application of the trustee . . ." Fed. R. Bankr. P. 2014(a) (emphasis supplied). These provisions are not authority for

> imposing an unwanted attorney on a trustee. To the contrary, they make clear that only the trustee may appoint trustee's counsel and that the court's power is limited to approving or rejecting the trustee's choice.
>
> The majority gives us, and I can find, no cause to doubt that these provisions mean what they say. As a leading bankruptcy-law treatise observes, "[e]ven when the court is justified in declining to approve a proposed employment, the court should not make the selection of an alternate but should allow the trustee to nominate another attorney satisfactory both to the trustee and to the court."
>
> * * *
>
> As noted, the majority of this Court, departing from the district court's analysis, treats § 327(a) as governing the appointment of counsel by the bankruptcy court, *see*, *ante* at **[6-7]**, but offers no rationale for disregarding the language of that provision and the corresponding Bankruptcy Rule indicating that the appointment power belongs exclusively to the trustee. Instead, in concluding that the bankruptcy court had the authority to impose its own choice of counsel on the trustee, the court cites only *In re Mandell*, 69 F.2d 830 (2nd Cir. 1934). *See*, *ante* at [7]. I am confident that *Mandell* does not stand for that proposition under current bankruptcy law.

As the dissent noted, *Mandell* was decided when express authority existed, under the former Bankruptcy Act, for the appointment by the court of substitute counsel.

The cases cited by the dissent substantiate the trustee's right to choose counsel. *See Matter of Allard*, 23 B.R. 517 (E.D. Mich. 1982) (appointment by court of attorney for trustee constituted abuse of discretion); *In re Doors & More, Inc.*, 126 B.R. 43, 44 (E.D. Mich. 1991) ("... it is not for the court to select counsel for the trustee"); and *In re Washington Manufacturing Co.*, 101 B.R. 944 (Bankr. N.D. Tenn. 1989) (debtor in possession, acting under authority of a trustee pursuant to Bankruptcy Code § 1107(a), enjoys the privilege to appoint counsel, subject to bankruptcy court approval, pursuant to Bankruptcy Code § 327(a)).

The cases cited in the majority, *In re Arochem*, 176 F.3d 610 (2d Cir. 1999), *In re Harold & William Development Co.*, 977 F.2d 906 (4th Cir. 1992) and *In re Vebeliunas*, 231 B.R. 181 (Bankr. S.D.N.Y. 1999), on the other hand, stand for the proposition that the two part test of Section 327(a) of the Bankruptcy Code (no adverse interest to the estate and disinterestedness) does not restrict the bankruptcy court's equitable power to disapprove of the trustee's choice of counsel in an appropriate case. Those decisions do not suggest that the bankruptcy court may go beyond rejecting the trustee's choice and appoint the counsel that it prefers. In that regard, the majority decision in *Vouzianas* is unique in authorizing the bankruptcy court to appoint the ***debtor's*** pre-petition counsel for the trustee when the bankruptcy court concludes it is in the estate's best interest to do so.[1]

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1. The fact that the bankruptcy court in this case approved the debtor's pre-petition counsel on debtor's counsel's application only adds to the irony. In a bankruptcy case the trustee represents the debtor's creditors and is often therefore adverse to the debtor. By imposing the debtor's counsel on the trustee the bankruptcy court placed the debtor in the middle of the administration of a bankruptcy case, a role reserved to the trustee.

The majority's decision in this case conflicts with the express terms of Bankruptcy Code § 327. *Vouzianas* stands alone among cases decided under the 1978 Act in authorizing the bankruptcy court to select counsel for the trustee. A decision of such magnitude warrants consideration by this Court.

(ii) The Decision Below Contravenes The Intent of Congress in Enacting The Bankruptcy Reform Act of 1978

A primary goal of the Bankruptcy Reform Act of 1978 was to remove bankruptcy judges from making administrative decisions in a case, reserving their powers for dispute resolution. As stated in the House of Committee on the Judiciary Report, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 4 (1977):

> . . . [T]he bankruptcy judge, because of the duties imposed upon him under the Bankruptcy Act, must take an active role in supervising and administering a bankruptcy case. No matter how fair a bankruptcy judge is his statutory duties give him a certain bias in a case, and the Bankruptcy Court as a result has been viewed by many as an unfair forum. The bill removes many of the supervisory functions from the judge in the first instance, transfers most of them to the trustee and to the United States Trustee, and involves the judge only when a dispute arises. Because the judge no longer will have to take an active role in managing bankruptcy cases, the Bankruptcy Court should become a forum that is fair in fact and in appearance as well.

Effectuating that goal, Section 327 provided for trustees to appoint professionals, subject to court approval. See, in this

regard, Senate Comm. On The Judiciary, S. Rep. No. 95-989, 95th Cong. 2d Sess. 38 (1978), "[t]his section [327] authorizes the trustee, subject to the court's approval, to employ professional persons such as attorneys, accountants, appraisers and auctioneers to represent or perform services for the estate."

Citing legislative intent, the district court in *Matter of Allard, supra*, held that the bankruptcy court abused its discretion by choosing counsel for the trustee rather than allowing the trustee to make an alternative selection. In so holding, the court stated as follows:

> At the outset, the court would note that allowing a bankruptcy judge to appoint counsel for a trustee is contrary to one of the primary goals of the 1978 Bankruptcy Act. That goal, the insulation of bankruptcy judges from trustees and the attorneys of the trustees during the administrative stages of a bankruptcy proceeding, was explained by Harold Marsh Chairman of the Commission on the Bankruptcy Laws of the United States, as follows:
>
> > As the result of the nature of the system itself, there exists a relationship between the bankruptcy judges, the trustees and the counsel for the trustees which many people, including many involved in the system, consider unhealthy from the point of view of proper judicial and governmental administration. The judges by and large appoint the trustees and thereby in effect select the counsel. They do not generally appoint persons

> who are total strangers to them, and it would be entirely unrealistic to expect that they would or should. The same trustees and lawyers then deal on a day to day basis with the judge regarding the routine conduct of the proceeding, and finally these same trustees and lawyers appear before the judges as litigants and counsel when a controversy arises.
>
> Hearings on H.R. 31 and 32. Before the Subcomm. on Civ. and Const. Rights of the House Comm. on the Judiciary, 94th Cong., 1st and 2nd Sess. pt. 1, 538 (1976). By appointing counsel for the trustee, the bankruptcy court engaged in the very activities that Commissioner Marsh described as unhealthy.

Id. at 517-518.

Section 327 of the Bankruptcy Code was enacted for the express purpose of allowing the trustee, alone, to choose qualified and disinterested counsel. The Second Circuit decision should be reviewed by this Court, in light of the Congressional intent.

B. The Second Circuit Decision Which Expands the Powers of Bankruptcy Court Judges Conflicts With Relevant Decisions of This Court, Warranting This Court's Review

The Second Circuit's decision in *Vouzianas* expands the power of Bankruptcy Courts beyond those prescribed by the Bankruptcy Code. By so holding the Second Circuit failed

to follow relevant decisions of this Court, which require federal judges to enforce statutes as written.

This Court's recent decision, *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) underscores this point. In that case this Court granted certiorari to review and thereafter affirmed the *en banc* decision of the United States Court of Appeals for the Eighth Circuit, denying the right of an administrative claimant to seek payment of its claim from property encumbered by a secured creditor's lien, on the grounds that only a trustee is entitled to relief pursuant to Section 506(c) of the Bankruptcy Code. The Eighth Circuit decision reversed the holdings of both the district court and the bankruptcy court which permitted an administrative creditor to invoke Section 506(c) on its own behalf. This Court found that Section 506(c), by authorizing only a specific party, the trustee, to seek payment precluded, by its plain terms, the right of other parties to seek relief under that statute.

In so finding, this Court noted:

> Here, the statute appears quite plain in specifying who may use § 506(c) — "the trustee." It is true, however, as petitioner notes, that all this actually "says" is that the trustee may seek recovery under this section, not that others may not. The question thus becomes whether it is a proper inference that the trustee is the only party empowered to invoke the provision. We have little difficulty answering yes.
>
> Several contextual features here support the conclusion that exclusivity is intended. First, a

situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume non-exclusivity. "Where a statute . . . names the parties granted the right to invoke its provisions, . . . such parties only may act . . ." Second, the fact that the sole party named — the trustee — has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others. Indeed, had no particular parties been specified — had § 506(c) simply read "there may be recovered from properties securing an allowed secured claim the reasonable, necessary costs and expenses, etc." — the trustee is the most obvious party who would have been thought empowered to use the provision. It is thus far more sensible to view the provision as answering the question "Who may use the provision?" with "only the trustee" than to view it as simply answering the question "May the trustee use the provision?" with "yes."

Nor can it be argued that the point of the provision was simply to establish that certain costs may be recovered from collateral, and not to say anything about who may recover them. Had that been Congress' intention, it could have easily have used the formulation just suggested. Similarly, had Congress intended the provision to be broadly available, it could simply have said so, as it did in describing the parties who could act under other sections of the Code. Section 502(a), for example, provides that a claim is allowed unless "a party in

> interest" objects, and § 503(b)(4) allows "an entity" to file a request for payment of an administrative expense. The broad phrasing of these sections, when contrasted with the use of "the trustee" in § 506(c) supports that conclusion that entities other than the trustee are not entitled to use § 506(c).

Id. at 6-8. *Accord: Patterson v. Shumate*, 504 U.S. 753 (1992) (plain reading of term "applicable non-bankruptcy law" as used in Section 541(c)(2) of the Bankruptcy Code includes both federal and state non-bankruptcy law.) In the absence of a clear congressional intent to the contrary, the natural reading of a statute prevails.

This Court in *Hartford Underwriters Insurance Co., supra*, further rejected the petitioner's reliance upon pre-code practice as a basis for expanding the scope of Bankruptcy Code § 506(c). This Court noted, ". . . we think the language of the Code leaves no room for clarification by pre-code practice." 530 U.S. at 11.

The foregoing cases illustrate the importance of the issues involved in the present case. Section 327(a) authorizes only the trustee to retain counsel. The bankruptcy court's authority, under the plain terms of the statute, is to either approve or disapprove the trustee's selection. For this reason, the dissent in *Vouzianas* found the Bankruptcy Court's decision to be unauthorized. The Second Circuit decision, to the contrary, overlooks relevant and recent precedents of this Court suggesting strongly that the dissent was right.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeal for the Second Circuit and ultimately, to vacate and reverse the judgment below and remand the matter to the bankruptcy court for the proceedings consistent with this Court's decision.

Respectfully submitted,

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